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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. ANTHONY JOSEPH RUSSO, JR., DANIEL ELLSBERG, Defendants.	No. 9373-(WMB)-CD MEMORANDUM IN SUPPORT OF MOTION FOR MISTRIAL

On August 9, 1972, the defendants filed a Motion for Mistrial seeking dismissal of the jury because of the prospective lengthy delay before the trial would begin. The defendants also submitted with the Motion for Mistrial a conditional waiver of double jeopardy claims that might arise from a dismissal of the jury.

At the time that the Motion for Mistrial was filed, the jury already had been impanelled for almost two weeks. The defendants' counsel pointed out that the earliest time at which the trial could be reconvened would be October 9th, in the event

that the Supreme Court denied certiorari. (Tr. at 5090). Counsel argued that since the cumulative delay on October 9th would be almost three months, it would be inevitable that even the most conscientious juror would be infected by the highly charged atmosphere surrounding the case.

Rather than ruling on the motion immediately, the court took it under submission, stating that a determination "will be made at the appropriate time." (Tr. at 5102). Events that have occurred in the intervening period make it most appropriate that the court now grant the motion.

(1) Even though the Supreme Court has denied certiorari, the delay that already has occurred far exceeds what was contemplated at the August 9th hearing. A major part of the responsibility for the further delay lies with the Government, which waited until the last day possible (October 13th - fifty days after the filing of the Petition for Certiorari) to file its Brief in Opposition. Had the Government filed its opposition in a more timely fashion in accordance with its view that further delay in this case was inappropriate, it is quite possible that the court could have decided the certiorari issue at its first conference, before it was deluged with new matters. In any event, it now seems that the earliest possible date at which the trial may be resumed is on or about December 1, 1972, more than four months after the jury was first empanelled.

The term of the current jurors ended in September, 1972. They originally agreed to stay on beyond that term for the duration of a trial that they believed would commence in late July or very early August, and that would end by about Thanksgiving or certainly by the end of the year, at the latest. Instead, they have been kept in a state of limbo for several months, not knowing when or if they will be called back to sit on the case. Long range plans for vacations, jobs, etc. un-

doubtedly have been thrown into disarray. Moreover, it is still impossible for the jurors to make new plans, for they do not know when the trial will begin and end. If the trial begins in December, the jurors will be tied up until March or April, almost a year after they were first sworn and more than half a year after the conclusion of their normal term. Such a lengthy period of uncertainty and sacrifice is not a reasonable burden to place upon ordinary citizens who have their own lives to which they must attend. To force these jurors to continue to sit for this case undoubtedly will create undercurrents of anger and resentment directed against the defendants, whom they may blame not only for the delay, but for the existence of the trial itself. Especially when the trial will be long, and the Court will find it necessary to enforce often severe restraints against the usual freedoms of the jurors during that period, the defendants are entitled to a jury upon whom such restraints have not been worked for four months prior to trial, and which has not already built up resentment against the restraints so imposed.

The prejudicial effects of such a long delay upon a sworn jury cannot be overcome by cautionary instructions of the type this court delivered to the jurors on August 9th. Even the most scrupulously responsible juror cannot maintain his guard for such a drawn out period of time against media reports and other controversy regarding a case of great public interest. Unlike the situation when such a case actually is being tried, the court cannot reemphasize on a day-to-day basis how important it is that jurors avoid all public or private discussion of the facts or issues involved.[1/] As the trial delay stretches from days to weeks

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1/ This point was recognized by the Solicitor General in his Application to Set Aside Stay Granted by Mr. Justice Douglas (July 31, 1972), at p. 9, where he stated:

> "Moreover, since the jurors have not been sequestered, it will be virtually impossible

(Cont'd)

to months, the immediacy of the judge's warning recedes from memory, and the necessity for following it to the letter seems exaggerated and unduly burdensome. The possibility that social relationships may have developed among some jurors increases the chances that discussions of the trial have occurred and opinions have been formed. Moreover, once information concerning a pending trial does seep through to an impanelled juror, it cannot help but have an impact upon him of greater significance than its impact upon an ordinary citizen. An impanelled juror is particularly sensitized to the issues of his case, and can easily be infected by outside influences. It is for these reasons that the Court of Appeals for the Third Circuit has stated that:

> "Long delays in [criminal] proceedings are unquestionably inimical to our system of justice and should not be countenanced save for compelling reasons. In instances where a short stay will not suffice, the trial judge should. . . grant a mistrial." United States v. Alker, 260 F. 2d 135, 159 (3rd Cir. 1958), cert. den. 359 U.S. 906.

(2) The dangers inherent in maintaining an impaneled jury over a four to five month period of trial interruption are especially real in the circumstances surrounding this case. The interruption in the instant case took place during the period of the recently concluded Presidential election campaign. During that campaign, the Vice-President of the United States made several significant and widely publicized statements concerning the motives, the guilt, and the patriotism of the defendants herein. On the widely viewed national television

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1/ (Cont'd)

> for them, as a practical matter, to avoid all contacts and comments about the case. That is hard enough while a trial is going on, but as the sworn jurors in the case, circulating in the community, the chance that many influences would reach them -- though entirely innocently -- would be very great."

program, Issues and Answers, the Vice-President was questioned about the actions of operatives of the Committee to Re-elect the President in the so-called Watergate Affair and related instances of alleged criminal activity:

> "MR. KAPLOW: But it is a fact that they are under indictment. Has not there been a pretty strong link between the Committee for the Re-election, money being paid to these people who were found in the Watergate?
>
> "VICE PRESIDENT AGNEW: Well, I don't know that. I am not certain of that. I can't answer that. The trials will show - will trace the flow of any campaign money. But what disturbs me greatly is the moral outrage of the same people who have, in the past, condoned this kind of conduct. Now why do I say that? I say it because certainly I think it is reprehensible and I think the people should be punished. And I agree with the Washington Post entirely that they should be punished. But I also feel that whether a person steals Larry O'Brien's secret papers or steals the Pentagon papers, he should be punished. And I didn't see any of these cries of moral indignation against the person accused of stealing the Pentagon papers. As a matter of fact, the same publications rushed to publish these matters.
>
> Now if you are going to purloin documents why is there a double standard about purloining re-election documents and purloining the Pentagon papers.
>
> "MR. GILL: Is that really a legitimate comparison in all respects, Mr. Vice President? You talk about purloined documents. Here was a man in the Ellsberg case who was involved in the study of the Pentagon papers. He did not break in anywhere.
>
> "VICE PRESIDENT AGNEW: Well, we don't know that. We don't know whether he broke in or not.
>
> "MR. GILL: He wasn't caught doing it.
>
> "VICE PRESIDENT AGNEW: Maybe that excuses him in your eyes but it doesn't in mine.
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> "MR. GILL: No, I am merely asking a question. I am not excusing, defending or convicting him, but he came into possession of them, in his original possession of them, legitimately and legally. Now I will not debate any point in this thing but his possession of them came about lawfully. When we speak

about Watergate, we talk about breaking and entering, outright burglary and bugging. Isn't there a difference?"

A.B.C.'s Issues and Answers (Oct. 29, 1972), Transcript of Proceedings, pp. 13-14 (a copy of which is attached as Appendix A, hereto) (emphasis added). These highly inflammatory charges became an important issue in the election campaign. The nationally syndicated New York Times columnist, Tom Wicker, took issue with the Vice-President's charges in his column of October 31, 1972 (a copy of which is attached as Appendix B hereto). Mr. Wicker's column was read over radio station KPSK in Los Angeles, giving wide curculation to his views and to those of the Vice-President.

In addition to the above charges, it seems that the Committee to Re-elect the President was directly or indirectly involved in further efforts to discredit at least one of the defendants as a means of creating an election issue. Time Magazine reported in its issue of October 23, 1972 that

> "Bernard Barker, the former C.I.A. agent who led the raiding party into the Watergate, recruited nine Cubans from Miami in early May and assigned them to attack Daniel Ellsberg, the man who released the Pentagon papers to the public. Barker flew the Cubans to Washington first class, showed them a picture of Ellsberg, and told them: 'Our mission is to hit him - to call him a traitor and punch him in thenose. Hit him and run.' The site chosen was outside the Capitol rotunda, where the body of J. Edgar Hoover was lying in state. The idea was to denounce Ellsberg, who was holding a rally on the steps, and start a riot. As it turned out, the 'riot' ended after a brief flurry of punches, most of which landed on Ellsberg's bodyguard."

More Fumes From the Watergate, Time Magazine (Oct. 23, 1972), p. 23 (emphasis added).

The court's instructions to the jurors on August 9th cautioned them against reading or listening to anything to do with this case, pending its continuation and/or conclusion.

Nothing was said about avoiding issues of relevance to the election campaign. Indeed, it is quite doubtful that any court constitutionally could order a juror to refrain from reading about, listening to, or discussing issues relating to a Presidential election campaign, at least for a period of over four months that included virtually the entire campaign period. In any event, it is reasonable to assume that these jurors exercised their rights and responsibilities as American citizens to inform themselves on the issues in the campaign. One of the major issues was the Watergate Affair, out of which controversy arose the Vice President's charges against the instant defendants and the reported assaults on defendant Ellsberg. Another major issue in the campaign was the Administration's handling of the Vietnam War, which involved considerable discussion of questions raised by the release of the Pentagon Papers. It is naive to assume that in informing themselves on these important issues, the jurors were not confronted with the references made to the defendants and their actions. Given their sensitivity as jurors to the issues of this case, the danger of prejudicial infection in the context of an often bitter and vituperative campaign is manifest. In such a situation, the admonition of the Third Circuit in the Alker case, supra, that a mistrial should be declared when there is long delay in a criminal trial is of special moment. At the least, there is a prima facie case of prejudice and "the government should [be] the one to seek to establish that no juror [has] had these matters come to his attention." Calo v. United States, 338 F. 2d 793 (1st Cir. 1964). See Briggs v. United States, 221 F. 2d 636 (6th Cir. 1955).

(3) Federal district courts possess broad discretionary authority to order mistrials "when particular

circumstances manifest a necessity for so doing, and when failure to discontinue would defeat the ends of justice." Wade v. Hunter, 336 U.S. 684, 690; Brock v. North Carolina, 344 U.S. 424,427.

The long delay and the prejudicial publicity surrounding this case warrant the use of that discretionary authority. The Fifth Circuit stated the standard that a trial judge should apply in deciding whether to grant a mistrial for prejudicial publicity:

> "In making his determination, the trial judge must consider such things as (1) the character or nature of the information published, some being more sensational or penetrating than others; (2) the time of the publication in relation to the trial; (3) the credibility of the source to which the information is attributable; and (4) the pervasiveness of the publicity. . . " Gordon v. United States, 438 F. 2d 858, 873 (5th Cir., 1971).

Here, the charges published and broadcast not only are inflammatory, but, coming in part from the second highest official in the country, are highly prejudicial. The charges came at the worst possible time in relation to the trial, i.e., during a long recess when the jury was dispersed into the community. The source of the charges -- the Vice President -- enjoys a great amount of credibility because of his office. Finally, the publicity was quite pervasive and came during a time when people were especially attentive to public affairs and politics.

The considerations that sometimes weigh against granting a motion for mistrial simply are not operative in the instant case. Defendants have waived any double jeopardy rights that might arise from a mistrial order. The choosing of a new jury will not involve much additional expense and delay, as an extensive voir dire of the current jury would be required even if the mistrial motion is not granted at this time.

The fact that the trial interruption resulted in part

from the defendants' petitions for mandamus and certiorari is irrelevant, especially in light of the waiver of double jeopardy. Defendants had a right to raise the issues regarding wiretapping, issues that both the Court of Appeals, in granting a stay to hear the mandamus petition on its merits, and Mr. Justice Douglas, in granting a stay pending decision on a petition for certiorari, found to raise substantial constitutional questions. Defendants cannot be forced to choose between their rights to raise those constitutional issues and their right to a fair trial before an impartial jury uninfected by prejudice. Cf., United States v. Fratello, 44 F.R.D. 444. Moreover, had the government not delayed for so long in responding to defendants' motions for disclosure of electronic surveillance, the issues raised by the petitions for mandamus and certiorari would have arisen prior to the empanelling of the present jury.

In short, the long recess of the trial proceedings for a period of at least four months, together with the inflamed public atmosphere surrounding the trial due to the election campaign, present compelling reasons for this court to exercise its discretion to grant the motion for mistrial. There are no substantial countervailing reasons why the motion should not be granted. Therefore, the motion for mistrial should be allowed.

Dated,

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